

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

BRENDAN AIRWAYS, LLC d/b/a USA3000 AIRLINES,
et al.,

Complainants,

v.

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY AND
NEWARK INTERNATIONAL AIRPORT,

Respondents.

Docket OST-2005-20407

**OPPOSITION OF JOINT COMPLAINANTS TO RESPONDENTS'
MOTION TO STRIKE EXHIBIT D AND EXHIBIT H TO THE COMPLAINT**

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**OPPOSITION OF JOINT COMPLAINANTS TO RESPONDENTS'
MOTION TO STRIKE EXHIBIT D AND EXHIBIT H TO THE COMPLAINT**

The Complainants¹ hereby file this opposition to Respondents' Motion to Strike Exhibit D and Exhibit H to the Complaint. Respondents claim that Exhibit D and Exhibit H require authentication and identification under the Federal Rules of Evidence (Fed. R. Evid. 901(a)) as well as a sponsor who is prepared to explain how the exhibits were prepared and from what underlying sources. Respondents maintain that the sponsor must also attest to the truthfulness and veracity of the data and methodology used.

Complainants urge the Department to deny Respondents' Motion to Strike. Complainants have already explained in Exhibit D and Exhibit H themselves how the exhibits were prepared and identified the source of the underlying information (i.e., the

¹ Brendan Airways, LLC d/b/a USA3000 Airlines, British Airways Plc, Scandinavian Airlines System, Societe Air France, Swiss International Air Lines Ltd., Virgin Atlantic Airways Limited, Deutsche Lufthansa AG, TAP Air Portugal, Alitalia-Linee Aeree Italiane-S.p.A., El Al Israel Airlines Limited, Air Jamaica Limited, Singapore Airlines Limited and KLM Royal Dutch Airlines.

Port Authority's own information). In addition, as Exhibit D and Exhibit H were created from the Port Authority's own data, the Complainants maintain that Respondents should already be aware of the truthfulness and veracity of the data. In any event, the Department does not generally require strict compliance with the Federal Rules of Evidence during administrative hearings and therefore it should not strike Exhibit D and Exhibit H simply because they might not technically comply with certain aspects of the Federal Rules of Evidence. See U.S.-Japan Small Packages Service Proceeding, 1986 DOT Av. LEXIS 285, October 8, 1986 ("Although the Federal Rules of Evidence are instructive and offer guidelines for this administrative proceeding, they are not binding.")² Should the Department deem it necessary, the Complainants are prepared to provide a witness at the administrative hearing to sponsor Exhibit D and Exhibit H and to meet any authentication and identification requirements established by the Department.

Complainants' Exhibit D shows that the Port Authority likely accumulated significant net income surpluses at Newark Terminal B in the two years before Continental's passengers were transferred to Terminal C. According to Complainants' calculations, which are based on data provided to them by the Port Authority, Terminal B generated net income surpluses in 2000 and 2001 of \$31.9 million and \$14.8 million, respectively. The accumulated surplus for 2000 and 2001 (\$46.7 million) would fully off-set the Port Authority's \$41.7 million Terminal B deficit for 2002-2004 and cover a

² The Complainants note that Respondents have also produced several exhibits without authentication or identification and/or without a sponsor who is prepared to explain how the exhibits were prepared. The Port Authority is in the position of the proverbial pot calling the kettle black! See PA-01 (purported Newark Airport photo); PA-03 (Louis Berger Technical Memorandum); PA-06 (Oct. 28, 2004 Meeting Minutes); PA-27 (Jan. 25, 2005 Meeting Minutes); PA-33 (Two Year Historical Figures); and PA-34 (Terminal B FIS/B-2/B-3 Scheduled Passengers by Airline).

significant portion of the Port Authority's projected \$18.1 million deficit for 2005.

(Exhibit A, Basis at p. 8).

In addition, Exhibit H demonstrates that the Port Authority used too conservative a traffic forecast, resulting in fees that are too high to recover its Terminal B costs (assuming all forecast costs are accurate). The Port Authority's projected \$18.1 million deficit is based on its very conservative forecast of 3,412,000 passengers for Terminal B for 2005 -- a mere 3% increase in passenger traffic from 2004 (3,316,000). (*Id.*) Indeed, the Port Authority's 2005 passenger forecast is even less than the number of Terminal B passengers carried in 2002 (3,566,000). (*Id.*) As shown in Exhibit H, the Port Authority's conservative 3% forecast increase in passenger traffic for 2005 is also in sharp contrast to the robust 21% growth in Newark's overall international passenger traffic for the year ended November 2004 over the same period in 2003.

The information regarding the net income surpluses contained in Exhibit D is based on the Port Authority's own data. The pro-forma revenue and income statements for 2000 and 2001 included in Exhibit D are based on the historical passenger traffic information provided by the Port Authority for this period and the General Terminal Charge and the Federal Inspection Service Fee then in effect. (Exhibit A, Basis at pp. 3-4). Since the Port Authority did not provide financial information for the years prior to 2002, it was necessary for the Complainants to create their own exhibit (based on the historical traffic information that the Port Authority had provided) to illustrate that Terminal B likely generated net income surpluses in 2000 and 2001 and to bring to the Department's attention certain questions relating to the Port Authority's treatment of the surpluses. The Department should not strike Exhibit D and reward the Port Authority for

failing to provide the Complainants with adequate financial information for 2000 and 2001 and attempting to hide the income surpluses that were likely generated by the Port Authority in these earlier years.

The Complainants' methodology for creating Exhibit D was also clearly explained in the exhibit. As stated on page 1 of Exhibit D:

Since 2000 & 2001 information were not included in Port Authority's rate package, but since 2000 & 2001 traffic statistics were included, a pro-forma analysis using the published 2000 & 2001 traffic and rate information has been created to indicate the likely net income base for 2000 & 2001 (all other revenue information is re-created using year 2002 data, i.e. rent income, concession revenue, and costs).

Thus, the Complainants have already described how Exhibit D was prepared and explained that they used the Port Authority's own data to make the calculations.

The passenger growth information contained in Exhibit H is also based on the Port Authority's own published information. As explained in Exhibit H, the Complainants obtained the passenger traffic statistics used in the exhibit from the Port Authority's own Monthly Traffic Report for November 2003 and November 2004, which are posted by the Port Authority on its website (www.panynj.gov). Accordingly, the Complainants have already explained in Exhibit H itself how the exhibit was created and stated that it is based on the Port Authority's own data.

Moreover, as noted, the Department does not generally require strict compliance with the Federal Rules of Evidence during administrative hearings. See U.S.-Japan Small Packages Service Proceeding, 1986 DOT Av. Lexis 285, October 8, 1986. This position is consistent with the evidentiary standard of Rule 24(a) of the Department's Rules of Practice (14 C.F.R. § 302.24(a)) which provides that "[p]resenting evidence at the

hearing shall be limited to material evidence relevant to the issues as drawn by the pleadings or as defined in the report of prehearing conference (emphasis added)" -- a different standard than that used in the Federal Rules of Evidence. In addition, the type of data contained in Exhibit H and obtained from the Port Authority's own Monthly Traffic Reports is similar to the type of statistical data of which the Department takes official notice without further authentication or a sponsoring witness. See e.g., 14 C.F.R. § 302.24(g)(iii)(Reports of Traffic and Financial Data); § 302.24(g)(iv)(Airline Traffic Surveys and Passenger Origin-Destination Surveys); § 302.24(g)(ix)(Airport Activity Statistics of Certificated Air Carriers); § 302.24(g)(xiv) (ICAO Statistical Summary); and § 302.24(g)(xix)(ABC World Airways Guide and Official Airline Guides).

The Complainants maintain that they have already adequately explained how Exhibit D and Exhibit H were prepared and identified the underlying sources of information used in the exhibits. Nevertheless, should the Department deem it necessary, the Complainants are more than willing to provide a witness at the administrative hearing to meet the Department's authentication and identification requirements with respect to Exhibit D and Exhibit H, and to sponsor the exhibits by providing testimony regarding their preparation. The Complainants maintain, however, that the Port Authority cannot seriously question the truthfulness and veracity of the underlying data used in the exhibits since it is their own.

Accordingly, for the reasons stated above, Respondents' Motion to Strike should be denied.

Respectfully submitted,

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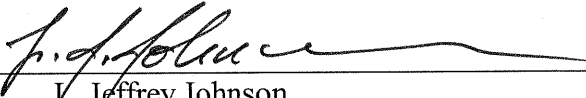
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of Joint Complainants to Respondents' Motion to Strike Exhibit D and Exhibit H to the Complaint has been served this 8th day of March, 2005, upon each of the following:

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